

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE)
1899 L Street, N.W., 12th Floor)
Washington, D.C. 20036)

Plaintiff,)

v.)

Civil Action No. 13-843

SOCIAL SECURITY ADMINISTRATION)
6401 Security Boulevard)
Baltimore, Maryland 21235)

Defendant.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff COMPETITIVE ENTERPRISE INSTITUTE (“CEI”) for its complaint against Defendant SOCIAL SECURITY ADMINISTRATION (“SSA”), alleges as follows:

- 1) This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel production under a FOIA request seeking copies of the federal records that contain the data used in computing figures shown in a Social Security Administration report about union activities.
- 2) In its request, plaintiff sought documents containing the following seven categories of information:
 1. Names of SSA employees who conducted union activities on official time in FY 2011;
 2. Number of hours spent, per employee, conducting union activities on official time in FY 2011;
 3. Cost of each employee (salary and benefits) who spent time on official time in FY 2011;
 4. SSA employees who spent 100% of their time on union activities in FY 2011;

5. Cost of travel and per diem associated with employees conducting union activities on official time in FY 2011;
 6. Cost of office space, telephones, and supplies in support of employees conducting union activities on official time in FY 2011;
 7. Cost of arbitration expenses from employees conducting union activities on official time in FY 2011.
- 3) CEI submitted its request on March 4, 2013, both by mail and by electronic mail.
 - 4) FOIA provides that a requesting party is entitled to a substantive agency response within twenty working days. (*See* 5 U.S.C. § 552(a)(6)(A)(i)). Thus, SSA owed Plaintiff a response by April 1, 2013.¹
 - 5) But SSA did not acknowledge CEI's request, much less respond.
 - 6) On April 5, 2013, still having still received no response from SSA, CEI employee Trey Kovacs emailed Dawn S. Wiggins, the Principal Public FOIA Liaison for the Social Security Administration, reminding her that "on March 4, 2013, 25 business days ago, we emailed the attached FOIA request to the Social Security Administration. To date, we have received no response whatsoever from your agency."
 - 7) On May 17, 2013, CEI General Counsel Sam Kazman left messages for both Ms. Wiggins and SSA's Public FOIA Liaison Mona W. Finch, inquiring about CEI's FOIA request, but neither of them ever returned his calls, and he never heard back from either of them.
 - 8) On May 23, 2013, Mr. Kazman called Ms. Wiggins' number and talked to Patricia Richardson of the SSA, who said the SSA would get back to CEI soon about the

¹ The statute contains an exception for "exceptional circumstances." But to avail itself of this exception, the agency must, within the 20 day deadline, must cite "exceptional circumstances" and request, and make the case for, an extension that is necessary and proper in light of those circumstances. No such request was ever made in this case.

FOIA request. But no one at SSA ever did. Thus, SSA has never responded to CEI's FOIA request, despite repeated inquiries and reminders, and despite the legal requirement that it respond within 20 days.

- 9) These withheld documents are Agency records subject to disclosure under FOIA. By refusing to respond to CEI's request, even though the legal deadline for responding has long passed, SSA has left Plaintiff no recourse but to bring this lawsuit to compel SSA to comply with the law.

PARTIES

- 10) Plaintiff CEI is a public policy research and educational institute in Washington, D.C., dedicated to opposing overregulation. CEI's programs include research, investigative journalism and publication, as well as a transparency initiative seeking public records relating to how policymakers use public resources, and a project focusing exclusively on labor policy (*see* <http://workplacechoice.org>).
- 11) Defendant SSA is an independent agency within the Executive Branch of the United States Government. It is an agency within the meaning of 5 U.S.C. § 552(f), established by statute and charged with responsibility for administration of federal programs with respect to social security programs and benefits. It has possession of and control over the records and documents sought by plaintiff in this action.

JURISDICTION AND VENUE

- 12) This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) because this action is brought in the District of Columbia and 28 U.S.C. § 1331 because the resolution of disputes under FOIA presents a federal question.

- 13) Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because Plaintiff resides in the District of Columbia and Defendant is a federal agency.

LEGAL ARGUMENTS

**Defendant SSA Owed But Has Failed to Provide Plaintiff a
Substantive Response to its Request**

- 14) FOIA provides that a requesting party is entitled to a substantive agency response within twenty working days, affirming the agency is processing the request and intends to comply. (5 U.S.C. § 552(a)(6)(C)(i)) Alternately, the agency must cite “exceptional circumstances” and request, and make the case for, an extension that is necessary and proper to the specific request. *See, e.g., Buc v. FDA*, 762 F.Supp.2d 62, 67-73 (D.D.C. 2011).
- 15) SSA regulations likewise state that, “In general, we will make a determination as to whether a requested record will be provided within 20 days (excepting Saturdays, Sundays, and legal public holidays) after receipt of a request by the appropriate official. . . This 20-day period may be extended in unusual circumstances by written notice to you, explaining why we need additional time, and the extension may be for up to 10 additional working days.” 20 C.F.R. § 402.140.
- 16) Thus, SSA owed CEI a substantive response to its request by April 1, 2013.
- 17) No office within Defendant SSA has provided any indication that it is in fact processing CEI’s request, or sought and made its case for an extension of time to respond to it as required when “exceptional circumstances” exist, or even provided CEI with an acknowledgement of, or identification/tracking number for, its request.

- 18) By not responding at all to CEI's request, SSA has constructively denied the request for records, and by this refusal Plaintiff has exhausted its administrative remedies. Due to this failure to respond, under well-established precedent Plaintiff need not administratively appeal. *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 184 (D.C. Cir. 2013).
- 19) For the foregoing reasons, SSA is now legally required to provide Plaintiff records responsive to its request.

CEI Is Entitled to a Fee Waiver, and SSA Has Waived Its Ability to Collect Any Fees for Processing CEI's Request

- 20) In addition to not responding to CEI's FOIA request, SSA also did not respond to CEI's request for a fee waiver. In its FOIA request, CEI duly requested that any applicable fees "be waived because the requested documents contain information of public concern." As it explained, "Release of the information is 'in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.' 5 U.S.C. § 552(a)(4)(A)(iii). The information sought by CEI in this FOIA request will be used to better the public's understanding of who and how many 'official-time' employees [union officials] are funded by tax dollars." As CEI noted, it "is regularly given fee waivers under the Freedom of Information Act (FOIA)" due to its public-interest status and role in disseminating information to the public. As it noted, the requested "information will be published as CEI research and on CEI's website." Moreover, "CEI regularly publishes information on the activities, structure, and operations of the federal government. This requested information will be made public and distributed—free of charge." In short, "the records requested will

be used to further the public's understanding of the operations of the SSA," and "will be disseminated widely to parties interested in the workings of the government."

- 21) Due to its failure to respond to CEI's FOIA request, SSA has waived its ability to collect fees for processing and copying the requested records. *See Lawyers Comm. for Civil Rights of the San Francisco Bay Area v. U.S. Dep't of the Treasury*, No. 07-2590, 2009 WL 2905963 (N.D. Cal. Sept. 8, 2009) (agency waived its right to object to plaintiff's request for a fee waiver where it failed to respond within twenty days of the request). Due to SSA's failure to respond to CEI's fee waiver request, CEI is deemed to have exhausted any administrative remedies regarding its fee-waiver request. *See Public Citizen v. Dept. of Education*, 292 F.Supp.2d 1, 4 (D.D.C. 2003).
- 22) In addition to being entitled to a fee waiver under FOIA, CEI is also entitled to a fee waiver under SSA's FOIA regulations, which waive fees for, *inter alia*, educational institutions² and any "representative of the news media." *See* 40 C.F.R. § 402.155.³

² As a think-tank, CEI qualifies as an educational institution, both because it conducts scholarly research designed to educate the public and policymakers, and because it provides internships for college students who use such internships to satisfy academic work-study requirements at the university level.

³ CEI also qualifies as a press entity for purposes of FOIA, because its websites, including its blogs, publish new material on a daily basis. *See, e.g., EPIC v. DOD*, 241 F.Supp.2d 5 (D.D.C. 2003) (court ruled that the publisher of a bi-weekly electronic newsletter qualified as the media, entitling it to a waiver of fees on its FOIA request); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1181-82 (10th Cir. 2005) (fee waiver granted for group that "aims to place the information on the Internet"; "Congress intended the courts to liberally construe the fee waiver requests of noncommercial entities"). As CEI explained on page 2 of its FOIA request, the requested "information will be published as CEI research and on CEI's website.. . . CEI regularly publishes information on the activities, structure, and operations of the federal government. This requested information will be made public and distributed—free of charge. . . to further the public's understanding of the operations of the SSA." CEI's blogs and web sites are regularly cited as a source by journalists and newspapers. *See, e.g., Oklahoma's Ranking a Wake Up Call, Sen. Holt Says*, Claremore Daily Progress, Sept. 28, 2011 (citing index from CEI's www.workplacechoice.org) (newspaper article available in Westlaw news database at 2011 WLNR 19863847); Mona Charen, *Creators Syndicate, You Might Suppose That President Obama Has His Hands . . .*, Bismarck Tribune, June 10, 2009, at A8 (syndicated columnist quoted CEI's OpenMarket blog); Hal Davis, *Earth's Temperature Is Rising and So Is Debate About It*, Dayton Daily News, April 22, 2006, at A6 (citing CEI's GlobalWarming.Org blog); Washington Examiner, August 14, 2008, pg. 24, *Think-Tanking* (quoting at length from CEI's OpenMarket); Mark Landsbaum, *Blogwatch: Biofuel Follies*, Orange County Register, Nov. 13, 2007 (citing OpenMarket) (available in Westlaw at 2007 WLNR 23059349); Pittsburgh Tribune-Review, *Best of*

FIRST CLAIM FOR RELIEF
Duty to Produce the Requested Records
-- Declaratory Judgment

- 23) Plaintiff re-alleges paragraphs 1-22 as if fully set out herein.
- 24) CEI has sought and been denied production of responsive records related to the conduct of official business.
- 25) CEI has a statutory right to the information it seeks.
- 26) SSA failed to provide CEI responsive records, or respond in any way.
- 27) CEI has exhausted its administrative remedies.
- 28) SSA has waived its right to collect fees for processing or responding to CEI's request due to its failure to respond to CEI's request for a fee waiver.
- 29) Plaintiff asks this Court to enter a judgment declaring that
 - i. The records described in CEI's March 4, 2013 request are public records subject to release under FOIA;
 - ii. SSA must release those requested records;
 - iii. SSA's denial of CEI's FOIA request is not reasonable, and does not satisfy SSA's obligations under FOIA;
 - iv. SSA's refusal to produce the requested records is unlawful.
 - v. SSA may not charge fees for processing or responding to CEI's FOIA request.

SECOND CLAIM FOR RELIEF
Release of the Requested Records -- Injunctive Relief

- 30) Plaintiff re-alleges paragraphs 1-29 as if fully set out herein.

the Blogs, Oct. 7, 2007 (quoting CEI's OpenMarket); *Coble Gets Praise from Enterprise Institute*, Salisbury Post, Sept. 25, 2011 (citing CEI's WorkplaceChoice.Org).

CEI's FOIA request attached a past CEI FOIA fee-waiver request that spelled out in more detail how it qualified for a press fee waiver. *See* March 4, 2013 FOIA request from CEI's Trey Kovacs to Dawn S. Wiggins of SSA, at 2 ("For an example of the documentation that CEI provides to support its fee waiver requests under the federal FOIA, see that attached pdf."); attached March 30 letter from Hans Bader to Department of Justice, at 2-3 (discussing CEI's "research, education, and publication functions," "newsletters aimed at legislators" and "education professionals," and how CEI "qualifies as a press entity for purposes of FOIA").

- 31) CEI is entitled to injunctive relief compelling SSA to produce all records in its possession responsive to CEI's request described, *supra*.
- 32) This Court should enter an injunction ordering SSA to produce to CEI, within 10 days of the date of the order, the requested records, without any charge or processing fees.

THIRD CLAIM FOR RELIEF
Costs And Fees – Injunctive Relief

- 33) Plaintiff re-alleges paragraphs 1-32 as if fully set out herein.
- 34) Pursuant to 5 U.S.C. § 552(a)(4)(E), the Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
- 35) This Court should enter an injunction ordering the SSA to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

WHEREFORE, Plaintiff requests the declaratory and injunctive relief herein sought, and an award for its attorney fees and costs and such other and further relief as the Court shall deem proper.

Respectfully submitted this 6th day of June, 2013,



Hans Bader, D.C. Bar No. 466545
Sam Kazman, D.C. Bar No. 946376
Competitive Enterprise Institute
1899 L Street, N.W., 12th Floor
Washington, D.C. 20036
(202) 331-1010
Attorneys for Plaintiff